



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/166911

PRELIMINARY RECITALS

Pursuant to a petition filed June 25, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on July 21, 2015, at Kenosha, Wisconsin.

The issue for determination is whether the Kenosha County Human Service Department (the agency) correctly determined that the Petitioner divested \$32,457.90 in assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Karen Mayer, Fair Hearing Coordinator
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.

2. On April 24, 2006, the Petitioner's husband, [REDACTED], executed a Transfer on Death Agreement for his investments with [REDACTED]. [REDACTED] named his daughter, [REDACTED], as the sole beneficiary. (Exhibit R8)
3. The holdings with [REDACTED] were solely in [REDACTED]'s name until his death. The final value of the account was \$13,187.93. (Exhibit R5)
4. On June 29, 2008, the Petitioner and her husband, [REDACTED], executed a marital property agreement in which they agreed that any property held in their individual names would not be classified as marital property. They further agreed to "waive any and all rights, claims and interest we may have during our lives and upon each other's death in property held in the name of the other." (Exhibit R7)
5. The Petitioner became eligible for Medicaid benefits on March 11, 2009. (Agreement of the Parties)
6. [REDACTED] was the community spouse until his death on January 27, 2015. (Agreement of the Parties; Exhibit R11)
7. On February 2, 2015, [REDACTED] issued a check to [REDACTED] in the amount of \$33.38. (Exhibit R4)
8. On March 23, 2015, [REDACTED] issued two checks to [REDACTED] in care of [REDACTED], one check in the amount of \$232.00 and a second check in the amount of \$39.00. (Exhibit R4)
9. On April 21, 2015, [REDACTED] issued a check to [REDACTED] in the amount of \$19,269.97. (Exhibit R2)
10. On June 16, 2015, [REDACTED] Petitioned the circuit court for a Transfer by Affidavit of [REDACTED]'s property, specifically a [REDACTED] Savings account (ending in [REDACTED]) with a balance of \$18,963.90, an [REDACTED] Check for \$232, an [REDACTED] check for \$39.00 and a [REDACTED] check for \$33.38. (Exhibit R6)
11. It is undisputed that the funds issued in the April 21, 2015 check were the entirety of the [REDACTED] account ending in [REDACTED]. (Statement of the Parties)
12. The [REDACTED] account was held solely in [REDACTED]'s name (Exhibit R3)
13. On June 18, 2015, the agency sent the Petitioner a manual notice of decision, indicating that her application for Medicaid benefits was denied effective July 1, 2015, because the agency determined that she divested \$32,457.90 in assets. (Exhibit R9)
14. The \$32,457.90 is the combined value of the [REDACTED] check and the [REDACTED] investments. (Exhibit R2)
15. On June 19, 2015, the agency sent the Petitioner an automated notice, indicating that as of June 11, 2015, she would not be enrolled in the community waivers program because she sold or gave away assets. (Exhibit R10)
16. The Petitioner's attorney filed a request for fair hearing that was received by the Division of Hearings and Appeals on June 25, 2015. (Exhibit P1)

DISCUSSION

A divestment occurs when the applicant disposes of an asset/resource for less than fair market value on or after the look-back date. *Wis. Admin. Code §DHS 103.065 (4)(a)*; *See Also Wis. Stats. §49.453(2)*; 42 U.S.C. §1396P(c)(1)(A) and (B). If a divestment occurs, the applicant is ineligible for Medicaid. *Id.*

42 U.S.C. §1396p(h)(1) defines the term "assets" as follows:

- (1) The term “assets”, with respect to an individual, includes all income and resources of the individual and of the individual’s spouse, including any income or resources which the individual or such individual’s spouse is entitled to but does not receive because of action—
- (A) by the individual or such individual’s spouse,
 - (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual’s spouse, or
 - (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual’s spouse.

In its June 18, 2015 notice, the agency claimed the Petitioner divested \$32,457.90, which is the combined value of the [REDACTED] check and the [REDACTED] investments. (See Exhibit R2) In its appeal summary and at the hearing, the agency indicated that the divestment also included the three checks issued by [REDACTED] and [REDACTED].

Thus, the assets at issue are as follows:

[REDACTED] Investments:	\$13,187.93
[REDACTED] Savings Account:	\$19,269.97
[REDACTED] Check:	\$232.00
[REDACTED] Check:	\$39.00
[REDACTED] Check:	\$33.38
<hr/>	
Total Assets:	\$32,762.28

It is the agency’s position that because the Petitioner took no action to make a claim against [REDACTED]’s estate that she divested assets.

MEH §17.2.1, paragraph 2 states the following:

It is also divestment if a person takes an action to avoid receiving income or assets s/he is entitled to. Actions which would cause income or assets not to be received include:

- a. Irrevocably waiving pension income.
- b. Disclaiming an inheritance.**
- c. Not accepting or accessing injury settlements.
- d. Diverting tort settlements into a trust or similar device.
- e. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
- f. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate. Count the action as a divestment only if:**
 - **The value of the abandoned portion is clearly identified, and**
 - **There is certainty that a legal claim action will be successful. The agency Corporation Counsel makes this determination.**

This includes situations in which the will of the institutionalized person's spouse precludes any inheritance for the institutionalized person. Under Wisconsin law, a person is entitled to a portion of his/her spouse's estate. If the institutionalized person does not contest his/her spouse's will in this instance, the inaction may be divestment.

Emphasis added

Petitioner's attorney is correct that under the Marital Property Agreement, the Petitioner is not entitled to the assets in question.

The marital property agreement signed by Petitioner and [REDACTED] states explicitly:

We, the undersigned, husband and wife, hereby agree that no property owned by either of us in our sole names shall be classified as marital property, community property, deferred marital property, quasi-marital property, quasi-community property, or augmented marital property under Chapter 766 of the Wisconsin Statutes...

...We hereby waive any and all rights, claims and interest we may have during our lives and upon each other's death in property held in the name of the other or in a trust created by the other...

...The individual property of the community spouse at his death shall be transferred to beneficiaries named on said spouse's accounts as non-probate transfer under Wisconsin Statutes, Chapter 766.58(30(f))....

There is no indication that either the Petitioner or [REDACTED] were incompetent at the time they signed the agreement. Wis. Stats. §766.58(1) states that "a marital property agreement is enforceable without consideration." Wis. Stats. §766.58(3)(a) further states that a marital property agreement may include terms stating that upon death, the property of either spouse may pass to a designated person by nontestamentary disposition (without a will). Thus, the terms of the marital property agreement are fully enforceable.

While the rules of intestate succession under Wis. Stats. Chapter 852 indicate that a surviving spouse is entitled to at least one half of the decedent's estate, depending upon whether there are any surviving children, Wis. Stats. §852.13 allows any person to disclaim an interest in the subject property. Wis. Stats. §854.13 allows a person to, "disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer..."

Thus, the Petitioner had the right to waive, and did waive any right to inherit the assets in question, which were held solely in [REDACTED]'s name. As such, it is unlikely the Petitioner would be successful in any court action seeking to reclaim the \$32,762.28. I note that the agency's corporation counsel did not participate in the hearing and did not provide any documentation showing that he/she evaluated the case and determined, with certainty, that the Petitioner would be successful in any claim against the \$32,762.28. Consequently, the Petitioner's failure to make a claim against [REDACTED]'s estate does not constitute a divestment under *MEH §17.2.1, paragraph 2*.

The agency also argues that by signing the marital property agreement in June 2008, the Petitioner took an action to disclaim an inheritance.

The marital property agreement was clearly executed in an effort to help the Petitioner obtain and maintain Medicaid eligibility. Indeed, the language within the June 2008 marital property agreement stating, "the individual property **of the community spouse at his death** shall be transferred to beneficiaries named on said spouse's accounts..." shows anticipation of the Petitioner's Medicaid application.

However, at the time the marital property agreement was executed, there was no quantifiable inheritance, obviously because [REDACTED], the community spouse, was still alive.

Any inheritance came into existence upon [REDACTED]'s death in January 2015. It is undisputed that the Petitioner took no action at that time to disclaim anything from [REDACTED]'s estate. As such, Petitioner did not divest assets under *MEH §17.2.1, paragraph 2*.

CONCLUSIONS OF LAW

The agency did not correctly determine that the Petitioner divested \$32,457.90 in assets.

THEREFORE, it is

ORDERED

That the agency reinstate the Petitioner's Medicaid benefits, effective July 1, 2015.

The agency shall take all administrative steps necessary to complete this task within ten days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

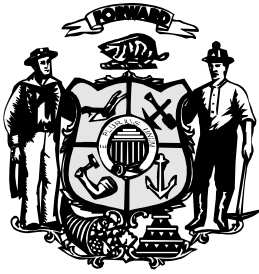
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 3rd day of August, 2015.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 3, 2015.

Kenosha County Human Service Department
Division of Health Care Access and Accountability
Attorney Timothy Crawford